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Federal Communications Commission

DA 97-2168

DISPATCHED AT

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Berlin and North Conway, New Hampshire)

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MM Docket No. 97-216
RM-9153

NOTICE OF PROPOSED RULE MAKING**Adopted: October 1, 1997****Released: October 10, 1997**

Comment Date: December 1, 1997

Reply Comment Date: December 16, 1997

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Fuller-Jeffrey Broadcasting Corporation of Greater Des Moines ("petitioner"), licensee of Station WPKQ, requesting the reallocation of Channel 279C from Berlin to North Conway, New Hampshire, as the community's first local aural transmission service, and the modification of Station WPKQ's license to specify North Conway as its community of license. Petitioner states that it will apply for Channel 279C, if reallocated to North Conway.

2. Petitioner states that its proposal complies with Section 1.420(i) of the Commission's Rules because the allotment of Channel 279C at North Conway is mutually exclusive with its allotment at Berlin. Further, it contends that the reallocation would result in a preferential arrangement of allotments because it would serve the higher priority of providing North Conway with its first local aural transmission service as opposed to a second local aural transmission service at Berlin.¹ Berlin, with a 1990 U.S. population of 11,824 persons, will retain local aural service from AM Station WMOU, according to the petitioner. Petitioner points out that North Conway is one of five distinct communities within the town of Conway, which has three local aural transmission services.² Of these five communities, it submits that North Conway has the majority of commercial and other establishments, including its own post office and zip code, the

¹ The allotment priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local aural service; and (4) other public interest matters. Priorities (2) and (3) are given co-equal weight. See Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982).

² The other communities within the Town of Conway are Center Conway, Redstone, East Conway and Conway. The radio stations which are licensed to the Town of Conway are Stations WBNC-FM, WMWV(FM) and WBNC(AM).

area's only hospital, several factory outlet malls and fire and police departments. North Conway is listed in the 1990 U.S. Census as a Census Designated Place ("CDP") and attributed with a population of 2,032 persons. Finally, petitioner states that North Conway is not located within any Urbanized Area.

3. Petitioner states that Station WPKQ is a grandfathered short-spaced station with respect to Station WKNE, Channel 279B, Keene, New Hampshire. In addition, it points out that Station WPKQ is presently short-spaced to both the allotment reference coordinates for Channel 279D and proposed new station on 279A at Montreal, Quebec, Canada, and the station on Channel 279A at Kahnawake, Quebec, Canada. However, since it is not requesting a change in Station WPKQ's presently transmitter site or facilities, petitioner contends that these grandfathered short-spacings are not an impediment to the requested change in the Table of Allotments.

Technical Summary

4. Channel 279C can be allotted to North Conway with a site restriction of 27.9 kilometers (17.3 miles) northwest.³ This site, which is Station WPKQ's presently licensed transmitter site, will maintain the present short-spacing to Station WKNE-FM, Channel 279B, Keene, New Hampshire, as well as the Montreal and Kahnawake stations and allotments. North Conway is located within 320 kilometers (200 miles) of the U.S.-Canadian border. Therefore, concurrence in the allotment by the Canadian Government required.

5. We recognize that Section 1.420(i) of the Commission's Rules does not specifically address grandfathered short-spacing situations such as this. However, the Commission has previously found that we would consider waiving strict application of Section 73.207 in limited circumstances, provided that no new short-spacings are created, no existing short-spacings are exacerbated, and the potential for interference between the currently short-spaced stations is not increased. See Newnan and Peachtree City, Georgia, 7 FCC Rcd 6307 (1992). In this regard, we request specific comment concerning whether waiver of Section 73.207 would be appropriate in this instance in view of the magnitude (112 kilometers) of the short-spacing with respect to Station WKNE, Channel 279B, Keene, New Hampshire. We believe petitioner's proposal warrants consideration since the allotment of Channel 279C could provide North Conway with its first local aural transmission service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

³ The coordinates for Channel 279C at North Conway are 44-16-14 North Latitude and 71-18-15 West Longitude

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Berlin, New Hampshire	279C	--
North Conway, New Hampshire	--	279C

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before December 1, 1997, and reply comments on or before December 16, 1997, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John Griffith Johnson, Jr.
Paul, Hastings, Janofsky & Walker LLP
1299 Pennsylvania Avenue, NW
Tenth Floor
Washington, D.C. 20004-2400
(Counsel to petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served

on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1 Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposals in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies In accordance with the provisions of Section 1.429 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239) at its headquarters, 1919 M Street, N.W., Washington, D.C.